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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHARLES WILLIAM JOHNSON, Defendant and Appellant.	A152874 (Napa County Super. Ct. No. CR163247)

MEMORANDUM OPINION[1]

Defendant Charles William Johnson was charged by information with felony driving under the influence (Veh. Code, § 23152, subd. (a)) and felony driving with a blood alcohol level above 0.08 percent (*id.*, § 23152, subd. (b)).[2] As to both counts, it was alleged that defendant had a prior felony conviction for driving under the influence (*id.*, § 23550.5, subd. (a)(1)). Prior to trial, the court granted the defense's request to bifurcate trial on the alleged prior conviction. A jury convicted defendant of the Vehicle Code section 23152, subdivisions (a) and (b) counts. That jury was excused with no

[1] We resolve this case by a memorandum opinion pursuant to the California Standards of Judicial Administration, standard 8.1(2).

[2] Defendant was charged with various other counts and enhancements. Our discussion of the facts will be limited to the counts and enhancements relevant to this appeal.

objection by the defense, even though they had not considered the matter of the prior conviction allegation. (See Pen. Code,[3] §§ 1025, subd. (b), 1164, subd. (b).)

At a hearing several days later, the trial court indicated it and the parties had forgotten about the prior conviction allegation. The People sought trial on it. The People filed a brief relying heavily on *People v. Saunders* (1993) 5 Cal.4th 580 (*Saunders*), arguing defendant waived his right to have the same jury that found him guilty of the substantive counts decide the prior conviction allegation. The People also contended double jeopardy did not preclude trial of the prior conviction allegation.

At the hearing on the motion, defendant objected to trial on the prior conviction allegation. Defendant argued *Saunders* was distinguishable because the prior conviction allegation was an element of his Vehicle Code section 23152, subdivisions (a) and (b) offenses, so it should have been tried by the same jury pursuant to sections 1025 and 1164. Moreover, the defense claimed the "bigger issue" was that trial of the allegation at that point would run afoul of the speedy trial limits in section 1382. The trial court granted the People's motion for trial to proceed on the prior conviction allegation.

On the day of trial, defendant objected to the trial on double jeopardy grounds, and reiterated his position that it violated his rights under sections 1025 and 1164. The trial proceeded and a jury found the prior conviction allegation true. The next day, the trial court sentenced defendant to a total of two years in prison.

Defendant now appeals. He concedes that under *Saunders* the trial court correctly found that he forfeited his statutory right to have a single jury determine both his guilt for the substantive offenses and the truth of the prior conviction allegation. He also acknowledges that *Saunders*, which involved analogous circumstances, held that "because the anticipated proceedings relating to the alleged prior convictions had not yet

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[3] Unless otherwise indicated, all further section references will be to the Penal Code.

transpired at the time the trial court discharged the jury, jeopardy did not then terminate as to those allegations." (*Saunders, supra,* 5 Cal.4th at p. 593.) Further, he acknowledges *People v. Monge* (1997) 16 Cal.4th 826 (*Monge I*), which the People relied on below to argue that federal and state double jeopardy principles do not apply to the trial of a prior conviction allegation.

Nevertheless, defendant challenges the trial of the prior conviction allegation on double jeopardy grounds, a claim he has not forfeited despite his failure to object to the discharge of the jury that found him guilty of the substantive counts. (*Saunders*, *supra*, 5 Cal.4th at p. 592 & fn. 8.) Citing to *Apprendi v. New Jersey* (2000) 530 U.S. 466, particularly the concurring opinion of Justice Thomas in *Apprendi,* he argues: "[t]he Court's opinion and the concurrence by Justice Thomas expressly state that even though the case before it did not involve the recidivism issue, the Court's logic would encompass the issue within the rule of *Apprendi*. Once the recidivism issue is 'Apprendized,' the Supreme Court's own affirmance of the California Supreme Court's ruling in *Monge I* can no longer stand as good law." This is not persuasive.

Saunders, *Monge I,* and *Monge v. California* (1998) 524 U.S. 721 (*Monge II*) clearly control the outcome of this case and compel the rejection of defendant's double jeopardy argument. (*Auto Equity Sales, Inc., et al v. Superior Court* (1962) 57 Cal.2d 450, 455.) As indicated above, *Saunders* involved analogous circumstances and rejected the defendant's double jeopardy claim. (*Saunders, supra,* 5 Cal.4th at pp. 586–587, 596–597.) *Saunders* reasoned the defendant was not twice placed in jeopardy because the determination of the truth of the priors was bifurcated from trial of the charges and "the anticipated proceedings relating to the alleged prior convictions had not yet transpired at the time the trial court discharged the jury." (*Id.* at p. 593.) In *Monge I*, the California Supreme Court held that the federal and state prohibitions against double jeopardy do not

apply to the retrial of a prior conviction allegation in a noncapital proceeding.[4] (*Monge I*, *supra*, 16 Cal.4th at pp. 831–834, 845.) The United States Supreme Court in *Monge II* affirmed the holding in *Monge I* regarding the federal double jeopardy issue. (*Monge II*, *supra*, 524 U.S. at pp. 724, 734.)

Defendant suggests that *Monge I* and *Monge II* are no longer good law after *Apprendi*, but a plain reading of *Apprendi* does not support that argument and neither does subsequent case law. (*People v. Barragan* (2004) 32 Cal.4th 236, 241–242; *Cherry v. Superior Court* (2001) 86 Cal.App.4th 1296, 1303; *People v. Marin* (2015) 240 Cal.App.4th 1344, 1366.) Defendant cites to *United States v. Blanton* (9th Cir. 2007) 476 F.3d 767, a Ninth Circuit case that criticized *Monge II*, and argues we ought to no longer feel bound by *Monge II* after *Blanton*. We are not convinced. (See *Marin*, *supra*, 240 Cal.App.4th at p. 1366 [noting *Blanton's* criticism of *Monge II*, but finding *Monge I*, *Monge II*, and *Barragan* binding].) Nor do we accept defendant's invitation to reach a different outcome based on Justice Thomas's concurring opinion in *Apprendi*, which expressed a minority view that the traditional understanding of an "element" of a crime for Fifth and Sixth Amendment purposes includes a prior conviction allegation that increases punishment. (*Apprendi*, *supra*, 530 U.S. at pp. 500–501 & 518, conc. opn. of Thomas, J.)

Next, defendant urges that "in light of *Apprendi*, the discharge of the first jury constituted the termination of jeopardy and barred retrial on the prior." In support, he cites to *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*) for the proposition that "the principles underlying the double jeopardy clause on the one hand, and the reasonable doubt burden

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[4] True, *Monge I* concerned a retrial whereas this case did not. But defendant fails to present any legal authority or rationale for the proposition that *Monge I*'s holding would not apply equally to this case. (Cf. *People v. Miller* (2008) 164 Cal.App.4th 653, 668 [citing *Monge I* and remanding for trial on a prior conviction allegation that was never tried, stating "double jeopardy protections do not apply to the trial of prior conviction allegations"].)

of proof and right to jury trial on the other, are not wholly distinct." (*Seel*, at p. 547.) This argument fails. The aforementioned quote in *Seel*, by itself, offers scant assistance for defendant's position. Moreover, *Seel* very clearly distinguished the type of recidivism allegation involved here from the conduct-based allegation at issue there when conducting its double jeopardy analysis. (*Seel*, *supra*, 34 Cal.4th at pp. 547–549.)

Finally, recognizing the obstacle that precedent presents in this case, defendant asks us to at least agree with his position and to "weigh[] in on the development of post-*Apprendi* law." We decline the invitation. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.)

The judgment is affirmed.

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Fujisaki, Acting P. J.

WE CONCUR:

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Petrou, J.

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Wiseman, J. *

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.